Supreme Court, U.S.
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No. 98-1467

In The

Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,

Petitioners,

and

JEFF BLACKWOOD, et al.,

v.

BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner, a coalition of private timber companies, asks the Court to review the procedural obligations of a federal agency under the National Environmental Policy Act ("NEPA"). The underlying case involves a fact-specific challenge of the failure of the United States Forest Service to prepare an Environmental Impact Statement ("EIS") for an extensive logging project on the Umatilla National Forest.[1] The NEPA dispute raises no conflict between the circuits, does not conflict with any of this Court's precedent, and presents no important legal issues that have not already been addressed by this Court.[2]

In 1996, the Tower wildfire swept across 50,000 acres of forest. In its immediate aftermath, the Forest Service developed a comprehensive "fire recovery strategy," most

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[1] The logging project is within the North Fork John Day Ranger District of the Umatilla National Forest, located in Northeast Oregon.

[2] This Court has had the opportunity to address the primary legal requirements and procedural obligations of NEPA. *See Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Weinberger v. Catholic Action of Haw*, 454 U.S. 139 (1981); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989).

of which involved logging the trees that survived the fire. The strategy included five timber sales, with Big Tower the largest and concentrated within the most severe burn area. Cumulatively, Big Tower, 96 Roadside Salvage, Tower Fire Salvage, South Tower, and Cable were developed to log approximately 50 million board feet of timber from the Tower Fire area. Instead of preparing a comprehensive EIS to analyze the overall impacts of the intense wildfire and subsequent logging strategy, the Forest Service made the deliberate decision to break its plan into multiple, individual logging projects, to be addressed separately in less-detailed Environmental Assessments (EAs) and Categorical Exclusions. The explicit rationale of the agency was to speed up the NEPA process and ensure that some projects would proceed in the event others became "snagged in appeals and/or litigation." Because this approach flies in the face of numerous NEPA requirements, Respondents filed suit in federal court.

The Ninth Circuit agreed with Respondents that because multiple logging projects were developed as part of a comprehensive forest recovery strategy, a single EIS was required to address the cumulative effects of the proposed timber sales. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998). In addition, the Ninth Circuit agreed that the EA prepared for the individual Big Tower project was wholly inadequate to support the Forest Service contention that no significant impacts would occur. *Blue Mountains*, 161 F.3d at 1213 ("[t]he Big Tower EA simply fails to persuade that no significant impacts would result from the Big Tower project"). The lack of information and analysis in the EA

raised substantial questions about the potential environmental impacts of the logging proposal, and an EIS was therefore ordered.

ARGUMENT

I. The Issues In This Case Are Not Sufficiently Important To Warrant The Court's Review

The Petitioners suggest that the requirements for post-fire salvage logging projects are of "great public importance" and should therefore perhaps be distinguished from the standard NEPA case. *See* Pet. at 6-7. This opinion is apparently not shared by the Forest Service, as the argument was not presented below and the agency has not sought further review.[3] As it stands, the economically injured timber companies are the only party attempting to keep this dispute alive.[4] Potential concerns of the Forest Service are most likely alleviated through

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[3] The Forest Service did not seek a rehearing before the Ninth Circuit.

[4] At a minimum, this Court should look warily at an outside, financially interested intervenor seeking to raise issues involving the procedural duties of federal agencies under NEPA. While a purely financially interested party is often allowed into NEPA litigation to present concerns at the injunction stage, the courts have considered the federal agency charged with compliance to be the only proper defendant to address NEPA's procedural obligations. *See Portland Audubon Society v. Hodel*, 866 F.2d 302, 308-09 (9th Cir. 1989), *cert.denied*, 492 U.S. 911 (1989); *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993); *see also, Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

existing regulations that provide the agency with alternative avenues in emergency and unusual circumstances. *See* 40 C.F.R. § 1506.11 ("[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the Council about alternative arrangements"); 36 C.F.R. § 215.10(d).

Instead of complying with the standard NEPA procedures or pursuing existing alternative arrangements, the Forest Service chose in this case to collide head-on with the NEPA regulations. As recognized by the Ninth Circuit, the agency made the deliberate decision to divide its post-fire logging strategy into multiple NEPA projects to "allow some projects to move forward if other projects get snagged in appeals and/or litigation." *Blue Mountains*, 161 F.3d at 1215, n. 6. Because the NEPA regulations do not allow the agency to avoid an EIS by purposefully breaking down a project into small component parts, 40 C.F.R. § 1508.27(b)(7), the Ninth Circuit imposed the "'snag' that the Forest Service feared but the law requires." *Blue Mountains*, 161 F.3d at 1215. NEPA requires that the agency analyze the combined effects of its several planned salvage sales, as they are in the same watershed and developed as part of a coordinated fire recovery strategy. *Id.* at 1216; 40 C.F.R. § 1508.25(a).

II. The Court Should Decline Review Because The Decision Is Not Contrary To Supreme Court Precedent

Discounting the strong factual differences, the Petitioner asserts that the *Blue Mountains* decision is inconsistent with *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). *See* Pet. at 7. In *Kleppe*, the plaintiffs sought an EIS to address the overall impacts of coal development across four separate states of the Northern Great Plains region. 427 U.S. at 395-96. The Court found no evidence in the record of a regional proposal or comprehensive federal plan for the development of the Northern Great Plains region, and therefore, no regional EIS was required. *Id.*, at 400-08.

In *Blue Mountains*, the Ninth Circuit cited *Kleppe v. Sierra Club* in recognition that the agency is entitled to discretion in identifying the geographical range of its cumulative effects analysis. *Blue Mountains*, 161 F.3d at 1215. However, unlike *Kleppe*, the federal agency in *Blue Mountains* specifically chose to develop a comprehensive strategy for the analysis area.

> As part of its Tower Fire recovery strategy, the Forest Service identified five potential logging projects in the same watershed, including the Big Tower project at issue in this appeal. Together, the sales would yield 40 – 55 million board feet logged from the same watershed, require approximately 20 miles of road construction and involve tractor-skid logging on steep slopes . . . In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower EA was completed.

161 F.3d at 1215.

Because the Forest Service developed a comprehensive strategy for the Tower Fire analysis area, NEPA required a comprehensive EIS. 40 C.F.R. § 1508.25(a); *see Blue Mountains*, 161 F.3d at 1215 ("[r]elying on the Forest Service's own acknowledgment that the five sales are part of a coordinated Tower Fire recovery strategy, BMBP argues that the Forest Service should have evaluated the cumulative impacts of these sales in a single EIS. We agree."). This fully comports with the teachings of *Kleppe v. Sierra Club;*

> [w]e begin by stating our general agreement with respondents' basic premise that § 102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time . . . when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.

427 U.S. at 409-410. Nowhere in the NEPA regulations or *Kleppe v. Sierra Club* is the agency allowed to break a comprehensive strategy for the same area into component parts to be analyzed individually, without addressing the overall, collective impacts. *See* 40 C.F.R. § 1508.27(b)(7). The case at bar therefore in no way conflicts with *Kleppe*, but is in fact perfectly consistent with it.

III. The Court Should Decline Review Because The Petitioner Has Identified No Conflict In The Circuits

As the Petitioners acknowledge, there is no intercircuit conflict concerning the distinction between an EIS and EA. *See* Pet. at 13. The Ninth Circuit has long recognized and understood the difference. *See Foundation for North Am. Wild Sheep v. U.S. Dept. of Ag.*, 681 F.2d 1172, 1178 (9th Cir. 1982) ("[t]he purpose of this EA was to determine whether an EIS was required, to facilitate preparation of an EIS if necessary, and to aid the Service in complying with NEPA if no EIS was required"); *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988) ("[i]f the agency finds, based on a less formal and less rigorous 'environmental assessment,' that the proposed action will not significantly affect the environment, the agency can issue a Finding Of No Significant Impact (FONSI) in lieu of an EIS"); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1148 (9th Cir. 1998) ("the Forest Service did not prepare an Environmental Impact Statement ('EIS') preparing instead a less detailed Environmental Assessment ('EA')"); *Save the Yaak Committee v. Block*, 840 F.2d 714, 717-720 (9th Cir. 1988).

In *Blue Mountains*, the Ninth Circuit correctly stated when an EA should be prepared under NEPA. 161 F.3d at 1212 ("an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS"). The Ninth Circuit also correctly defined an EA. *Id.* ("[a]n EA is a 'concise public document that briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact").

And the Ninth Circuit set forth its long-standing test for when an EIS must be prepared, which is in full agreement with the other circuits. *Id.* ("[a]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor' "); *see also, National Audubon Society v. Hoffman*, 132 F.3d 7, 18 (2nd Cir. 1997) ("a party challenging the agency's decision not to prepare an EIS must show only that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact"); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974).

The Ninth Circuit in *Blue Mountains* was presented with a Forest Service proposal to build eleven miles of roads, log with tractors, and remove approximately 6,000 logging truckloads of trees from an environmentally sensitive area. 161 F.3d at 1210. The agency declared there would be no significant impact, but failed to address or adhere to the recommendations of the leading scientific report on post-fire salvage logging, despite explicit Regional direction to consider the report. *Blue Mountains*, 161 F.3d at 1213. In addition, the Big Tower EA provided no documentation of the estimated sediment that would result from the logging and road building activities, even though the proposal included substantial tractor logging on steep slopes and sensitive soils. *Id.* And the EA failed to consider the combined impacts of the 1996 wildfire along with the multiple proposed timber sales. *Id.*, at 1213-1215 ("[n]o document explores the collective impact of these projects"). Because substantial questions

remained concerning whether the logging proposal may cause a significant degradation of some environmental factor, the Ninth Circuit followed the appropriate standard and ordered an EIS to be prepared. *Id.*, at 1213-14.[5]

Contrary to the fears of the Petitioners, there is no reason to suggest that the *Blue Mountains* decision will "bring the workings of federal agencies such as the Forest Service to a screeching halt due to time, budgetary and energy constraints." Pet. at 13-14. If there were any chance of this occurrence, surely the Forest Service would have joined in the petition. As it stands, the only party seeking review are the timber companies with a purely financial interest in the few trees that remain standing. *See Blue Mountains*, 161 F.3d at 1215.[6]

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[5] The fact that the Forest Service was unable to analyze all potential impacts of its multiple and substantial logging proposals within a concise EA is not an indication that the EA requirement is too stringent, but rather a strong indication that the agency should have chosen to undertake an EIS in the first place. *See* 46 Fed.Reg. 18026, 18037 (March 23, 1981) (the Council on Environmental Quality has advised agencies that an EA should be no more than 10-15 pages, and that in most cases, a lengthy EA indicates that an EIS is needed).

[6] As recognized by the Ninth Circuit, had the Forest Service fully complied with NEPA's requirements, it still had sufficient time to react and conduct logging in the Big Tower area.

> Our decision does not jeopardize the Forest Service's ability to undertake emergency measures in the wake of a disaster. Here, the catastrophic fire burned in August of 1996. The logging began in August of 1998. The Forest Service had ample opportunity and an obligation to undertake a more searching

CONCLUSION

This case presents no conflict between circuits, does not run counter to this Court's precedent, and the private timber companies have presented no reason for the Court to revisit its past NEPA decisions. Respondents respectfully request that the timber companies' petition be denied.

Respectfully submitted,

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environmental review or to propose activities on a much smaller scale.

Blue Mountains, 161 F.3d at 1216.